Slip Opinion)

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BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In the Matter of:	)	
Mayaguez Regional Sewage Treatment Plant Puerto Rico Aqueduct and Sewer Authority	)	NPDES Appeal No. 92-23
Docket Nos. PR0023795	)	

[Decided August 23, 1993]

ORDER DENYING REVIEW

Before Environmental Appeals Judges Nancy B. Firestone, Ronald L. McCallum, and Edward E. Reich.

MAYAGUEZ REGIONAL SEWAGE TREATMENT PLANT
PUERTO RICO ACQUEDUCT & SEWAGE AUTHORITY

NPDES APPEAL NO. 92-23

ORDER DENYING REVIEW

[Decided August 23, 1993]

Syllabus

The Puerto Rico Aqueduct and Sewer Authority (PRASA) seeks review of the denial of an evidentiary hearing request on certain issues relating to Region II's denial of PRASA's application for a National Pollutant Discharge Elimination System (NPDES) permit under Section 301(h) of the Clean Water Act (CWA), 33 U.S.C. §1311(h). PRASA applied for the §301(h) permit in 1979 for its then proposed Mayaguez Regional Wastewater Treatment Plant, a Publicly Owned Treatment Works (POTW). The plant, located in Mayaguez, Puerto Rico, on the Western shore of the island, discharges into the Atlantic Ocean.

Under CWA §301(h), the Administrator may, under certain circumstances, modify or relax the secondary treatment standards imposed under CWA §301(b)(1)(B), 33 U.S.C. §1311(b)(1)(B). In order to qualify for a §301(h) permit, the applicant has the burden of demonstrating that it complies with each of the criteria set forth in CWA §§301(h)(1) - (h)(9) and the implementing regulations. The Region denied the permit, as well as PRASA's evidentiary request, on the grounds that PRASA failed to demonstrate compliance with CWA §§301(h)(1), (h)(2), and (h)(9). Under CWA §301(h)(2), POTWs must demonstrate that the modified discharge will not interfere with the attainment or maintenance of that water quality which allows for recreational uses and assures protection of public water supplies and the protection and propagation of fish and wildlife. If, as here, the receiving waters are already stressed from sources other than the applicant's discharge, the applicant has the burden of demonstrating, by a preponderance of the evidence, that its modified discharge will not contribute to those stressed conditions, and will not retard recovery of the biota if the level of pollution from other sources decreases in the future. 40 C.F.R. §125.61(f). Rather than making this demonstration, PRASA submitted evidence that shows the contribution from its discharge would be minimal or uncertain without more testing and analysis. The Region concluded that PRASA failed to meet its burden of demonstrating that the discharge would not contribute to existing conditions, and that PRASA therefore failed to raise a genuine issue of material fact warranting an evidentiary hearing. This appeal followed.

Held: To support an evidentiary hearing request, the applicant must raise an issue of material fact. This issue must be a genuine one. In determining whether a factual dispute is "genuine," the Board adopts the standard articulated by the Supreme Court in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986), with regard to motions for summary judgment. Under this standard, a party must present sufficient probative evidence in support of its position from which a reasonable decisionmaker could find in that party's favor under the applicable standard of proof.

Under CWA §301(h)(2) and 40 C.F.R. §125.61(f), PRASA has the burden of demonstrating, by a preponderance of the evidence, that its proposed modified discharge will not contribute to the already stressed conditions of the coral communities in the vicinity of the discharge and

will not retard recovery if levels of pollution from other sources decrease in the future. The data submitted by PRASA in support of both its permit application and its evidentiary hearing request are insufficient to satify PRASA's burden. Thus, PRASA has not raised a genuine issue of material fact and the evidentiary hearing request was therefore properly denied. Accordingly, review of PRASA's petition is denied.

Before Environmental Appeals Judges Nancy B. Firestone, Ronald L. McCallum, and Edward E. Reich.

Opinion of the Board by Judge Firestone:

By petition dated August 25, 1992, the Puerto Rico Aqueduct and Sewer Authority (PRASA) seeks review of U.S. EPA Region II's denial of an evidentiary hearing request on certain issues concerning the Region's denial of PRASA's application for a National Pollutant Discharge Elimination System (NPDES) permit under Section §301(h) of the Clean Water Act (CWA), 33 U.S.C. §1311(h). At the request of the Environmental Appeals Board, the Region filed a response to the petition for review (Region's Response). In an Order dated October 26, 1992, the Board granted PRASA's request to supplement its petition to address additional issues raised in the Region's Response. PRASA filed a supplemental petition on December 15, 1992 (Supplemental Petition), and the Region filed a reply on February 19, 1993. The Environmental Appeals Board has jurisdiction to grant or deny this petition for review under 40 C.F.R. §§124.72 & 124.91. *See* 40 C.F.R. §125.59(g)(5) ("Appeals of section 301(h) determinations shall be governed by the procedures in 40 CFR part 124."). For the reasons set forth below, the petition for review is denied.

I. *Background*

On September 12, 1979, PRASA applied for an NPDES permit modifying the secondary treatment requirements of the Act for its then proposed Mayaguez Regional Wastewater Treatment Plant, a Publicly Owned Treatment Works (POTW). [1] The plant, located in Mayaguez, Puerto Rico, on the Western shore of the island, discharges into the Atlantic Ocean. Ordinarily, POTWs are required, under CWA §301(b)(1)(B), 33 U.S.C. §1311(b)(1)(B), to meet

[1] The Mayaguez plant was issued an NPDES permit on September 30, 1987, containing secondary treatment requirements, and began operating in December of 1987. Although the permit expired on November 29, 1992, PRASA filed a timely application for renewal and therefore continues to operate under the terms of the 1987 permit until the Region acts on the renewal application. *See* 40 C.F.R. §122.6.

secondary treatment standards established under the Act. [2] However, PRASA sought a modification of the secondary treatment requirements under the procedure established in CWA §301(h). [3] *See* Petition for Review, at 2. In general, CWA §301(h) provides that the Administrator, with the concurrence of the State, may, under certain circumstances, [4] issue an NPDES permit that modifies or relaxes the secondary treatment requirements of the Act. [5] POTWs receiving §301(h) modifications must at a minimum perform primary treatment and, among other things, demonstrate that the modified discharge will not interfere with the attainment or maintenance of that water quality which allows for recreational uses and assures protection of public water supplies and the protection and propagation of fish and wildlife. *See* CWA §301(h)(2); 40 C.F.R. §125.61.

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[2] Under 40 C.F.R. §125.3(a)(1), which implements CWA §301(b), all permits for POTWs must contain effluent limitations based upon secondary treatment from the date of permit issuance.

[3] CWA §301(h) applies to discharges from POTWs into marine waters. This section defines "discharge into marine waters" as:

> [A] discharge into deep waters of the territorial sea or the waters of the contiguous zone, or into saline estuarine waters where there is strong tidal movement and other hydrological and geological characteristics which the Administrator determines necessary to allow compliance with paragraph (2) of this subsection, and section 1251(a)(2) of this title.

The Atlantic Ocean is a marine water within the meaning of this section.

[4] The Act requires that the applicant satisfy each of nine criteria. In summary, these criteria, which are implemented through 40 C.F.R. Part 125, Subpart G, require the applicant to demonstrate that: (1) there are applicable water quality standards for those pollutants for which the modification is sought and the applicant complies with such standards; (2) the discharge will not interfere (alone or in combination with pollutants from other sources) with the attainment or maintenance of a balanced indigenous population of marine life, or with the attainment or maintenance of that water quality which assures protection of public water supplies and recreational activities; (3) the applicant has established a system for monitoring the impact of the modified discharge on marine life; (4) the modified requirements will not result in any additional requirements on any other point or nonpoint source; (5) all applicable pretreatment requirements will be enforced; (6) certain pretreatment requirements for toxic pollutants are met; (7) the applicant has established a schedule of activities to eliminate the introduction of toxic pollutants from non-industrial sources; (8) there will be no new or substantially increased discharge of the pollutant to which the modification applies beyond that specified in the permit; and (9) the proposed modified discharge will receive at least primary or equivalent treatment and also meets the toxicity criteria established under CWA §304(a)(1).

[5] The Agency defines secondary treatment in terms of three parameters: biochemical oxygen demand, suspended solids, and pH. *See* 40 C.F.R. §133.102.

Region II tentatively denied PRASA's §301(h) permit application on February 6, 1984, on the grounds that the Commonwealth of Puerto Rico had not concurred in the permit under the procedure of 40 C.F.R. §§125.60(b)(2) and 124.54. *See* Letter from Jacqueline E. Schafer, Regional Administrator, to Carlos Mulero, Executive Director, PRASA (Feb. 6, 1984) (Exh. 6 to Region's Response). Under these procedures, States must certify that a modified discharge will comply with all applicable State water quality standards. [6] The Region also concluded that Puerto Rico had failed to issue a positive determination that the modified discharge would not result in additional treatment requirements for other point sources, pursuant to 40 C.F.R. §125.63. *Id.*

Thereafter, in February and June of 1985, PRASA submitted a revised §301(h) application along with supplemental information prepared for PRASA by the engineering firm of Metcalf & Eddy to support its assertion that the modified discharge would in fact meet the §301(h) waiver requirements. Following a review of this new information, the Region once again issued a tentative denial on July 17, 1986, on the grounds that PRASA's proposed modification would not satisfy the §301(h) modification requirements. In particular, the Region identified the following deficiencies: (1) PRASA had failed to demonstrate that dilution at the outfall would ensure compliance with the Commonwealth's water quality standards for chlordane or the Agency's saltwater criteria for chlordane or mercury; (2) PRASA had failed to demonstrate the proposed discharge would not contribute to already stressed conditions in the vicinity of the proposed discharge; (3) PRASA had failed to thoroughly characterize several components of the biota or present a comparative demonstration of the effects of the existing and modified discharge; and (4) PRASA had failed to implement a pretreatment program. *See* Letter from Christopher J. Daggett, Regional Administrator, to Arturo Valldejuly, Executive Director, PRASA (July 17, 1986) (Exh. 7 to Region's Response).

On October 10, 1986, the Region, in accordance with the procedures established in 40 C.F.R. §124.10 AND §124.14 issued a public notice and solicited comments on the application and its tentative decision. At PRASA's request, a public hearing was held on April 28-29, 1987, and comments were taken until May 15, 1987. In April of 1987, PRASA filed an additional report prepared by Metcalf

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[6] Puerto Rico subsequently certified that the proposed 301(h) permit would comply with State law on February 5, 1985.

& Eddy (M & E Study). [7] The M & E Study presented additional information concerning, *inter alia*, the condition of the water surrounding the proposed discharge and the potential impact if the §301(h) permit application were granted. The Study concluded that although the coral communities in the vicinity of the modified discharge were already stressed due to heavy sediment loadings, the addition of 850 tons annually from PRASA's modified discharge would not have a measurable effect on the surrounding coral communities when compared to the contributions from the Rio de Anasco. M & E Study at 4-24 - 4-27. This additional sediment, the Study states, "will account for slightly more than one percent of sediment loading." *Id*. at 4-18.

The Region issued a final decision denying PRASA's §301(h) application on December 13, 1991, on the grounds that PRASA failed to meet the requirements of CWA §§301(h)(1), (h)(2), and (h)(9) and the implementing regulations. [8] PRASA filed a request for an evidentiary hearing on February 26, 1992, in which it contested the Region's factual and legal basis for denying the §301(h) permit. *See* Exh. 3 to Region's Response. As an attachment to its hearing request, PRASA submitted a 1992 report prepared by the U.S. Geologic Survey entitled "Assessment of the Biota, Sediments, and Water Quality Near the Discharge of Primary Treated Effluent from the Mayaguez Regional Wastewater Treatment

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[7] Following submission of the 1987 M & E Study, the Region contracted with the firm of Tetra Tech, Inc. to conduct a technical review of that Study. Tetra Tech produced a report in August of 1990, entitled: *Technical Review of the 1987 Information Supplement of the Mayaguez Regional Wastewater Treatment Plant (Puerto Rico) Section 301(h) Application for Modification of Secondary Treatment Requirements for Discharge into Marine Waters* (hereinafter Tetra Tech Report). (Exh. 1 to Region's Response to PRASA's Supplemental Petition). PRASA argues that because the Region did not list this Report in the certified index to the administrative record submitted along with the Region's response to PRASA's petition for review, the Report is not part of the administrative record in this proceeding. Supplemental Petition, at 2-3. Thus, according to PRASA, the Board must strike any of Region II's findings or conclusions that are based on this report. *Id*. We disagree. The Report was cited on page 32 of the Region's response to comments (*see* Exh. 8 to Region II's Response) and therefore became part of the administrative record. *See* 40 C.F.R. §124.17(b) ("any documents cited in the response to comments shall be included in the administrative record for the final permit decision * * *."). *See also* 40 C.F.R. §124.18(e) (material readily available at the issuing Regional office need not be physically included in the same file as the rest of the record as long as it is referred to in the response to comments). Although, as the Region acknowledges, it would have been clearer if the Region had listed the Tetra Tech Report in the certified index (Region's Response to Supplemental Petition at 4 n.4), PRASA was aware of the report and, in fact, requested and received a copy of it approximately six weeks before requesting an evidentiary hearing. (*See* Exh. 8 to Region's Response to Supplemental Petition). Indeed, PRASA has shown no prejudice whatsoever from Region II's failure to list the report in the certified index.

[8] *See supra* n.4; 40 C.F.R. Part 125, Subpart G.

Plant: Bahia de Anasco, Puerto Rico: December 1990 - January 1991" (Exh. 4 to Region's Response) (hereinafter "1992 Report"). According to PRASA, this report supports its contention that the plant satisfies the §301(h) requirements for a relaxation of the secondary treatment standards. [9] Appendix 3 to this report[10] states, in pertinent part, that the hypothesis that the plant's discharge may be causing additional harm to the coral reefs has been neither proved nor disproved, and that further study is needed because of the presence of pollution from other sources. Appendix 3 to 1992 Report, at 11.

The Region denied PRASA's evidentiary hearing request on July 23, 1992. *See* Exh. 2 to Region's Response. In its denial, the Region relied primarily on PRASA's failure to submit sufficient evidence to raise a material issue of fact with regard to PRASA's compliance with the requirements of CWA §301(h)(2) and its implementing regulations. Under the regulations implementing CWA §301(h)(2), where the marine environment surrounding the proposed outfall is already stressed from sources other than the applicant's discharge, the applicant has

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[9] Although the Region reviewed the 1992 Report, it contends that it was not obligated to do so because the Report was submitted after May 15, 1987 (the close of the comment period). We disagree. As the Region correctly notes, in publicly noticing its tentative decision to deny PRASA's §301(h) permit application, the Region invoked the provisions of 40 C.F.R. §124.14(a)(1) (Reopening of the public comment period). In such cases, parties are required to submit all reasonably available factual grounds supporting their position, including all supporting materials, by the close of the comment period. Under 40 C.F.R. §124.76, where the Region elects to apply the requirements of §124.14(a), any supporting information that was not submitted to the administrative record by the close of the comment period, may not be submitted as part of an evidentiary hearing request except for good cause. Good cause exists where information could not reasonably have been made available earlier. 40 C.F.R. §124.76. In the present case, the studies on which the 1992 Report is based were conducted after the plant began operating in December of 1987. Thus, because the information in the Report (an assessment of the impact from the actual operation of the plant) could not have been reasonably ascertained or made available by the close of the comment period, good cause existed for failing to submit the information earlier.

We note that in cases where the provisions of §124.14 are not invoked, parties may submit additional factual information in support of an evidentiary hearing request even if that information was available during the comment period but had not been previously submitted to the administrative record. See 49 Fed. Reg. 38,042 (Sept. 26, 1984) (supporting information need not be submitted to the administrative record during the comment period); 40 C.F.R. §124.74(b)(1) (parties requesting an evidentiary hearing must submit information supporting the request unless the information is already part of the administrative record); In re Boise Cascade Corp., NPDES Appeal No. 91-20, at 10 (EAB, Jan. 15, 1993) (holding that the Region may not deny an evidentiary hearing request on the ground that substantiating data was not submitted during the comment period).

[10] Appendix 3 is entitled: *Coral Diversity and Cover in Reefs off Mayaguez Bay: Relation to the Mayaguez Sewage Treatment Plant Outfall*, Report submitted to the U.S. Geological Survey, Carlos Goenaga, Dept. Biology, RUM, Mayaguez, PR, April, 1991.

the burden of demonstrating, to the satisfaction of the Administrator, that its discharge *does not or will not*:

> (1) Contribute to, increase, or perpetuate such stressed conditions;
>
> (2) Contribute to further degradation of the biota or water quality if the level of human perturbation from other sources increases; and
>
> (3) Retard the recovery of the biota or water quality if the level of human perturbation from other sources decreases.

40 C.F.R. §125.61(f) (emphasis added). The Region concluded that PRASA failed to present sufficient evidence to allow a reasonable finder of fact to conclude that PRASA had satisfied these criteria. In particular, the Region explained that because the waters surrounding the outfall are undeniably stressed, PRASA has the burden of demonstrating that its modified discharge will meet the requirements listed above. PRASA instead presented evidence by both its own contractor and the U.S. Geological Survey that shows that the additional impact of the modified discharge on the surrounding coral communities would be minimal or uncertain when compared to existing sediment loadings. However, because the regulations indicate that there can be *no* contribution to existing stressed conditions, and because PRASA concedes that it will contribute 850 tons per year of additional sediment, the Region concluded PRASA could not prevail as a matter of law, and therefore there was no basis for an evidentiary hearing. [11] This appeal followed.

According to PRASA, it did indeed raise a material issue of fact regrading its compliance with CWA §301(h)(2) and 40 C.F.R. §125.61(f). Specifically,

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[11] In its denial, the Region stated, in part:

> The applicant failed to address the issue of stressed waters. PRASA's failure to adduce evidence in the nature of a stressed waters demonstration, on the issue of whether the proposed modified discharge will interfere with the protection and propagation of a [balanced indigenous population] fails to raise a genuine issue of material fact as to this issue. PRASA has not demonstrated, to the satisfaction of the Administrator, that its proposed modified discharge will assure compliance with sub-section 301(h)(2) of the Act, with regard to non-interference with the balanced indigenous population in stressed waters.

Denial of Evidentiary Hearing Request, at 3 (Exh. 2 to Region's Response).

PRASA argues that the data submitted in support of its waiver application, including the 1987 M & E Study and the 1992 Report, demonstrate that it will satisfy the stressed water demonstration required by section 125.61(f). PRASA does not dispute that the coral communities in the vicinity of the discharge are stressed due to heavy sediment loadings. *See* Petition for Review, at 10-11. Nor does PRASA contest that, because of these already stressed conditions, it must make the demonstration required by 40 C.F.R. §125.61(f). *Id.* Rather, PRASA contends that the effect of its discharge presents a factual issue which should be resolved in an evidentiary hearing. [12] For the following reasons, we conclude that the Region properly denied the evidentiary hearing request with respect to PRASA's compliance with CWA §301(h)(2) and the implementing regulations, and we therefore deny review. [13]

II. *Discussion*

Under the rules governing an NPDES proceeding, there is no appeal as of right from the Regional Administrator's decision. *In re Miners Advocacy Council*, NPDES Appeal No. 91-23, at 3 (EAB, May 29, 1992). Ordinarily a petition for review is not granted unless the Regional Administrator's decision is clearly erroneous or involves an exercise of discretion or policy that is important and should therefore be reviewed by the Environmental Appeals Board. [14] *See, e.g.*, *In re City of Jacksonville, District II Wastewater Treatment Plant*, NPDES Appeal No. 91-19 (EAB, August 4, 1992). The petitioner has the burden of demonstrating that review should be granted. *See* 40 C.F.R. §124.91(a). In determining whether PRASA has met this burden, we will first focus on whether PRASA has met the requirements of CWA §301(h)(2).

A. *Compliance with CWA §301(h)(2)*

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[12] PRASA also argues that the Region erroneously concluded that PRASA failed to satisfy the requirements of CWA §§301(h)(1) and (h)(9).

[13] As discussed above, an applicant for a §301(h) modified permit must demonstrate that it satisfies all requirements of the Act. Because PRASA did not meet its burden of demonstrating compliance with §301(h)(2), we do not reach the issue of whether or not PRASA met the requirements of §§301(h)(1) and (h)(9).

[14] With respect to appeals under Part 124 regarding NPDES permits, Agency policy is that most permits should be finally adjudicated at the Regional level. 44 Fed. Reg. 32,887 (June 7, 1979). While the Board has broad power to review decisions in NPDES permit cases, the Agency intended this power to be exercised "only sparingly." *Id.*

Under the regulations, a party requesting an evidentiary hearing must raise a material issue of fact relevant to the issuance of the permit. *See* 40 C.F.R. §§124.74(b)(1) and 124.75(a)(1). [15] We construe this to mean that the RA must ensure that there is a *genuine* issue of material fact. [16] This requirement is very similar to the requirement set forth in Rule 56 of the Federal Rules of Civil Procedure regarding summary judgment. [17] Rule 56 provides that summary judgment:

> shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

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[15] 40 C.F.R. §124.74(b)(1) provides that requests for evidentiary hearings must:

> state each legal or factual question alleged to be at issue, and their relevance to the permit decision, together with a designation of the specific factual areas to be adjudicated * * *. Information supporting the request or other written documents relied upon to support the request shall be submitted as required by § 124.73 unless they are already part of the administrative record required by § 124.18.

Under 40 C.F.R. §124.75(a)(1):

> the Regional Administrator shall decide the extent to which, if at all, the request shall be granted, provided that the request conforms to the requirements of § 124.74, and sets forth material issues of fact relevant to the issuance of the permit.

[16] *See In re Miami-Dade Water and Sewer Authority Department*, NPDES Appeal No. 91-14, at 17 (July 27, 1992); *In re City of Jacksonville, District II Wastewater Treatment Plant*, NPDES Appeal No. 91-19, at 2 (August 4, 1992).

We note that under 40 C.F.R. §124.84 any party to an evidentiary hearing has the right to move for summary determination on the basis that there is no genuine issue of material fact for determination. Today's decision does not affect this right. That is, where the Region concludes that there is a need for an evidentiary hearing on a material issue of fact, summary disposition may still be appropriate. For example, in the present context, if PRASA had presented sufficient facts to warrant an evidentiary hearing, and the Region failed to present any relevant evidence to rebut PRASA's evidence, PRASA would be free to request that the Presiding Officer decide any or all issues by summary determination.

[17] Although the Federal Rules do not apply to these proceedings, we have, in certain circumstances, relied on these rules for guidance. *See In re Wego Chemical & Mineral Corporation*, TSCA Appeal No. 92-4, at 13-14 & n.10 (EAB, Feb. 24, 1993).

We think that the standard established under Rule 56 provides useful guidance for the Board in evaluating whether the Region must grant an evidentiary hearing.

In construing Rule 56, the Supreme Court has explained that in order to defeat a motion for summary judgment, a party must demonstrate that an issue is both "material" and "genuine." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1985). A factual dispute is material where, under the governing law, it might affect the outcome of the proceeding. The issue here -- whether PRASA has satisfied the requirements of CWA §301(h)(2) and 40 C.F.R. §125.61(f) -- is material. Thus, the only question we must resolve is whether PRASA has raised a "genuine" issue.

A factual dispute is genuine if the evidence is such that a reasonable finder of fact could return a verdict in either party's favor. *Id*. If so, summary judgment is inappropriate and the issue must be resolved by a finder of fact. If, on the other hand, the evidence, viewed in a light most favorable to the non-moving party, is such that no reasonable decisionmaker could find for the nonmoving party, summary judgment is appropriate. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970); 6 J. Moore's Federal Practice ¶56.15[1] (stating that summary judgment is appropriate when a party is entitled to judgment as a matter of law). In such a case, Rule 56 provides a mechanism for avoiding the unnecessary delay and expense of a full blown trial. 6 J. Moore's Federal Practice ¶56.04[1].

Under Rule 56, the determination of whether or not summary judgment is appropriate also implicates the substantive evidentiary standard of proof in a particular proceeding. *Anderson*, *supra*, at 252. That is, in deciding whether a genuine factual issue exists, the judge must consider whether the quantum and quality evidence is such that a finder of fact could reasonably find for the party producing that evidence under the applicable standard of proof. As the Court explained:

> Whether a jury could reasonably find for either party, * * * cannot be defined except by the criteria governing what evidence would enable the jury to find for either the plaintiff or the defendant: It makes no sense to say that a jury could reasonably find for either party without some benchmark as to what standards govern its deliberations and within what boundaries its ultimate decision must fall, and these standards and boundaries are in fact provided by applicable evidentiary standards.

Id. at 254-55. Thus, in determining whether a genuine issue exists, a judge must decide whether a finder of fact, applying the applicable evidentiary standard, could reasonably find for either party. *Id*. at 255; *see also First National Bank of Arizona v. Cities Service Co*., 391 U.S. 253, 288-90 (1968).

Because the inquiry in the present context, i.e., whether a party has raised a genuine issue of material fact, is for our purposes virtually identical to that in the summary judgment context, we believe that the standard articulated by the Supreme Court in *Anderson* should be applied in the context of evidentiary hearing requests as well. Thus, in the context of an evidentiary hearing request, a genuine issue of material fact exists only if a party requesting an evidentiary hearing presents sufficient probative evidence from which a reasonable decisionmaker could find in that party's favor by a preponderance of the evidence. [18] For the reasons stated below, we conclude that the PRASA has failed to meet this standard and thus its burden with respect to its evidentiary hearing request.

In order to receive a permit under CWA §301(h), an applicant has the burden of demonstrating by a preponderance of the evidence that it meets each of the criteria listed in CWA sections 301(h)(1) through (h)(9) and the implementing regulations. *See* 40 C.F.R. §125.60(g). Section 301(h)(2) of the Clean Water Act authorizes the Administrator to issue a permit modifying the secondary treatment requirements imposed under CWA §301(b)(1)(B) if the applicant demonstrates that:

> [T]he discharge of pollutants in accordance with such modified requirements will not interfere, alone or in combination with pollutants from other sources, with the attainment or maintenance of that water quality which assures protection of public water supplies and the protection and propagation of a balanced indigenous population of shellfish, fish, and wildlife, and allows recreational activities, in and on the water[.]

Where, as here, receiving waters are already stressed due to pollution from sources other than the applicant's discharge, the applicant has the burden of demonstrating,

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[18] Although the Act does not specify a standard of proof against which the Agency must review the evidence presented in support of the modified permit application, the traditional standard of proof for informal Agency proceedings (such as a permit determination) is a "preponderance of the evidence." *See In re Penzoil Exploration and Production Company*, UIC Appeal No. 88-1, at 13 (CJO, Nov. 19, 1990). This standard of proof is also applicable to NPDES evidentiary hearings. *In re City of Fayetteville, Arkansas*, NPDES Appeal No. 88-1, at 7 (CJO, Dec. 22, 1988).

among other things, that it will not contribute to, increase, or perpetuate such stressed conditions, and will not retard recovery of the biota if levels of pollution from other sources decrease in the future. 40 C.F.R. 125.61(f). In the 1979 preamble to Part 125 Subpart G, the Agency made clear that it would be difficult to meet this burden. [19] The preamble states:

> As a practical matter, it will be extremely difficult for most applicants discharging into stressed waters to demonstrate that their discharge will meet the requirements of section 125.61. As a factual matter, the discharge of additional pollutants into an already polluted marine environment virtually always increases or contributes to adverse impact; it is extremely difficult, as a practical matter, to demonstrate that it does not.

44 Fed. Reg. 34,806 (June 15, 1979). According to the preamble, in order to make this demonstration, the applicant must:

> (1) document the difference between the marine communities that currently exist in the vicinity of its outfall and the balanced, indigenous population that would exist in the absence of all sources of pollution; (2) demonstrate that its discharge is not contributing to the present biological degradation associated with stressed waters by comparing the marine populations at the outfall site with those at a similarly stressed control site (absent its discharge); and (3) demonstrate that its discharge will not contribute to further degradation of the biota if the level of pollution from other sources increases, and will not retard the recovery of the biota if the level of pollution from other sources decreases. This latter showing, which requires a predictive analysis of biological responses to future pollution, is so difficult that EPA is unable to provide a specific guidance or suggested analytical procedures for making this demonstration.

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[19] We note that portions of the regulations implementing CWA §301(h) promulgated in 1979 were invalidated by the United States Court of Appeals for the District of Columbia Circuit in 1981. *See Natural Resources Defense Council, Inc. v. E.P.A.*, 656 F.2d 768 (D.C. Cir. 1981). The Agency promulgated final amendments to the regulations implementing section 301(h) in 1982. 47 Fed. Reg. 53,666 (November 26, 1982). The language of the stressed waters demonstration, however, has remained virtually unchanged.

Id. In the present case, the data submitted by PRASA fail to satisfy the requirements of §125.61(f).

PRASA does not dispute that the coral reefs surrounding the outfall are already stressed due to heavy sediment loadings. Rather, the dispute concerns the impact the modified discharge will have on these conditions. According to PRASA, this impact will be insignificant compared to the total sediment loadings from the Rio de Anasco. In this regard, the 1987 M & E Study states that out of a total sediment loading of 65,000 tons per year, "the proposed discharge of primary treated effluent will contribute approximately 850 tons per year * * *." M & E Study at 4-24. The Study concludes that this amount of sediment will have no measurable effect on current conditions when compared to existing sediment loadings. *Id*.

As stated above, a discharger into already stressed waters must demonstrate, among other things, that its modified discharge would not retard recovery of the biota if existing sources of pollution were to decrease *in the future*. 40 C.F.R. §125.61(f)(3). The studies submitted by PRASA do not even purport to make such a finding. Rather, the studies focus on the relative present contribution of the discharge when compared to total sediment loadings. [20] While PRASA's relative contribution may be small at the present time compared to other sediment sources, it does not follow that PRASA's discharge will not retard recovery in the future if these other sources decrease. In such a situation, PRASA's contribution may indeed retard the speed of any recovery. Because the data submitted by PRASA do not attempt to address this issue, PRASA has failed to make the demonstration required under the regulation and has thus failed to present

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[20] We note that Chapter 4 of the 1987 M & E Study states:

> It is unlikely that intensive agricultural practices on the steep hills of the Rio de Anasco basin that have continued for over three centuries will be terminated or even inhibited, since agriculture continues to be one of the main features of the rural Puerto Rican economy. Consequently, the continued erosion and sedimentation events, * * * will continue to contribute very large and significant quantities of sediments and nutrients into the Bahia de Anasco and thus limit any theoretical development of the coral communities.

M & E Study, at 4-26. Although a decrease in pollution from human perturbations other than PRASA's discharge may be unlikely, the regulations require that PRASA demonstrate that its discharge will not retard recovery if such a decrease should occur in the future. PRASA has therefore failed to make the demonstration required under §125.61(f)(3).

a genuine issue for a hearing. Failure to provide any analysis on future impacts was sufficient for the Region to deny the §301(h) permit.

We note, further, that PRASA's attempt to create a genuine issue of material fact with regard to its *present* contribution also fails to meet the demonstration required under 40 C.F.R. §125.61(f)(1). While PRASA's contribution to existing stresses may be small compared to input from the Rio de Anasco, the facts proffered by PRASA in the 1987 M & E Study fail to demonstrate that 850 tons per year of additional pollutants will not contribute to existing conditions. As the Region has noted, although PRASA's discharge may not be sufficient, in and of itself, to significantly impact the coral reefs if other stresses did not exist, this is not the showing required by the regulations. *See* Response to Comments, at 14 (Exh. 8 to Region's Response). Rather, PRASA must demonstrate by a preponderance of the evidence that it will not contribute to existing stresses. PRASA has not proffered sufficient facts to allow a reasonable decision maker to find in its favor in this regard.

The 1992 Report, prepared by the United States Geological Survey (USGS), confirms our analysis. Contrary to PRASA's contentions, the USGS Report does not demonstrate that the modified discharge will not contribute to present conditions. This report, submitted in support of PRASA's evidentiary hearing request, assesses the impact of the actual operation of the plant on the surrounding marine environment. Appendix 3 to this report states, in part:

> [C]oral cover, gorgonian density and other parameters were lower in the stations closest to the outfall; therefore, the hypothesis that there is an effect by the sewage outfall on the coral reef benthic environment is supported or, at least, it is not invalidated. The available evidence, however, does not prove the hypothesis of damage by the outfall either, mainly because of the presence of other pollution sources. Further detailed work with additional stations is needed to assess the hypothesis of damage by the outfall.

Coral Diversity and Cover in Reefs off Mayaguez Bay: Relation to the Mayaguez Sewage Treatment Plant Outfall, Appendix 3 to 1992 Report, at 11. Thus, according to this report, further study would be needed to prove that PRASA's proposed discharge does or does not have an impact on existing conditions. Because neither of these studies demonstrate that PRASA's proposed discharge will not contribute to presently existing stresses, there is no genuine issue of material fact warranting an evidentiary hearing.

We recognize that §301(h) permit applicants face an extraordinary burden. However, this is consistent with the 1979 preamble to Part 125, Subpart G which indicates that it will be "extremely difficult" to meet these requirements. In fact, the Agency originally proposed to prohibit any modified discharges into marine waters that were already stressed. *See* 44 Fed. Reg. 34,806 (June 15, 1979). In response to comments, however, the Agency revised this section to allow such discharges if the applicant could make the stressed waters demonstration noted above. [21] Thus, the requirement that applicants seeking §301(h) permits make the demonstration noted above, reflects the Agency's great reluctance to grant §301(h) waivers to facilities discharging into already stressed waters. [22]

In this case, the data submitted by PRASA in support of its §301(h) application is insufficient to satisfy the stressed waters demonstration required by 40 C.F.R. §125.61(f). To support it hearing request, PRASA needed to allege facts demonstrating that the modified discharge would not retard recovery of the biota if the amount of pollution from other sources decreases in the future. In addition, it needed to show that the discharge would not contribute in any way to the already stressed condition of the coral reefs in the vicinity of the discharge. PRASA's reliance on studies indicating that the impact of the discharge is minimal as compared to other sources or at best uncertain, are insufficient to satisfy PRASA's burden. PRASA has therefore failed to raise a genuine factual issue warranting an

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[21] We note that in *Arkansas v. Oklahoma*, 112 S.Ct. 1046, 1057-58 (1992), the Supreme Court rejected an interpretation of the Clean Water Act that would prohibit any discharges that "might" contribute to further degradation of waters already in violation of a State water quality standard. That case, however, involved the interpretation of an Oklahoma water quality standard prohibiting "degradation" of water quality. The Court agreed with the Agency that this standard should be interpreted to mean that the State requirement would only be violated if the discharge would cause an actual "detectable" violation of Oklahoma's water quality standards. *Id*. at 1052.

The case before us, however, does not involve the violation of a specific water quality standard. Rather, the regulation implementing CWA §301(h)(2) requires that permit applicants seeking to discharge primary treated sewage into already stressed waters affirmatively show that they *will not contribute* in any way to existing environmental conditions rather than to the violation of a specific environmental standard. Importantly, the §301(h) regulations, 40 C.F.R. §125.61(f), specify the precise demonstration that must be made to satisfy this requirement. The showing that the applicant must make in the present case is therefore very different from the showing identified in *Arkansas v. Oklahoma*.

[22] This is not to say that there is no case where discharges into stressed waters would be allowed. Where, for example, the receiving waters are stressed by pollutants other than those in the proposed discharge and such pollutants do not contribute to existing stresses, a §301(h) permit may be appropriate.

evidentiary hearing.[23] As the Supreme Court explained in *Anderson*, *supra*, 477 U.S. at 249, there is no genuine issue for a trier of fact where the party opposing summary judgment fails to adduce sufficient evidence to support a verdict in that party's favor. Accordingly, the Region properly concluded that PRASA failed to adduce facts sufficient to raise a genuine issue of material fact. The Region therefore properly denied the evidentiary hearing request.

B. *Compliance with CWA §§301(h)(1) and (h)(9)*

As additional grounds for denying the evidentiary hearing request, the Region concluded that PRASA failed to meet the requirements of CWA §§301(h)(1) and 301(h)(9). Under Section 301(h)(1) and 40 C.F.R. §125.60, the applicant must demonstrate that there is an applicable water quality standard specific to the pollutants for which the modification is sought, and that the applicant complies with these standards. Section 301(h)(9) requires that the proposed modified discharge receive at least primary or equivalent treatment and also meet the toxicity criteria established under CWA §304(a)(1). In its petition for review, PRASA raises numerous objections to the Region's analysis and conclusions with regard to these provisions. However, because we agree with the Region that PRASA failed to meet its burden of demonstrating that the proposed modified discharge would satisfy the requirements of CWA §301(h)(2) and 40 C.F.R. §125.61, we do not reach these issues.

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[23] We note that although PRASA cites the Tetra Tech Report, *See Supra* note 7, in support of its position that the modified discharge will not contribute to existing stresses on the surrounding coral communities, *see* Supplemental Petition at 60 & n.169, that report, at best, indicates that the impact of the proposed discharge on the surrounding coral reefs will be uncertain. The report concludes that "based on the limited data available for review and the conservative assumptions used, it appears that nutrient concentrations in the proposed discharge *may* contribute to stresses currently experienced at the coral reefs." Tetra Tech Report, at 25 (emphasis added).

III. *Conclusion*

Information submitted by a person requesting an evidentiary hearing under 40 C.F.R. §124.74 must raise a genuine issue of material fact. In determining whether a genuine issue has been raised, the Board adopts the standard articulated by the Supreme Court in *Anderson v. Liberty Lobby*, *supra*, with regard to motions for summary judgment. Under this standard, to demonstrate the existence of a genuine issue of material fact, a person requesting an evidentiary hearing must present sufficient probative evidence in support of its positions from which a reasonable decisionmaker could rule in that person's favor under the applicable standard of proof. PRASA has failed to meet this standard with respect to at least one of the criteria necessary to support the issuance of a permit under CWA §301(h).

Under CWA §301(h)(2) and 40 C.F.R. §125.61(f), PRASA has the burden of demonstrating, by a preponderance of the evidence, that its proposed modified discharge will not retard the recovery of the biota if the level of pollution from other sources decreases in the future. In addition, it must demonstrate that it will not contribute to the already stressed conditions of the coral communities in the vicinity of the discharge. At best, however, the data submitted by PRASA in support of its §301(h) waiver application indicate that when compared to existing sediment loadings from the Rio de Anasco, sediment from the modified discharge will be minimal or uncertain. However, these data are insufficient to demonstrate that if existing levels of sediment were to decrease, PRASA's contribution would not retard recovery of the biota. In addition, PRASA has failed to demonstrate that its discharge would not contribute to existing conditions. PRASA has therefore failed to raise a genuine issue of material fact warranting an evidentiary hearing. That is, PRASA failed to present sufficient evidence from which a reasonable decisionmaker could decide in its favor. The evidentiary hearing request was therefore properly denied. Accordingly, review is denied. [24]

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[24] In the supplement to its petition for review, PRASA contends that because the full administrative record was only available at Region II's headquarters in New York, and because of the high cost of traveling to New York, PRASA was hindered in its ability to exercise its right of appeal. PRASA's Supplemental Petition, at 61-62. PRASA, however, provides no support for this assertion. While PRASA may have incurred certain costs in arranging travel to New York, it has failed to present any evidence that such costs prevented it from obtaining any portion of the administrative record. In addition, there is no indication in the record on appeal that PRASA was hindered in any significant way from exercising its appellate rights. PRASA's argument in this regard is therefore rejected.

So ordered.

CERTIFICATE OF SERVICE

I hereby certify that copies of the forgoing Order Denying Review In the Matter of Mayaguez Regional Sewage Treatment Plant, Puerto Rico Aqueduct and Sewer Authority, NPDES Appeal No. 92-23, were sent to the following persons in the manner indicated:

First Class Mail
Postage Prepaid:

Sheila D. Jones, Esq.
Lisa D. Alvarado, Esq.
Cutler & Stanfield
700 Fourteenth Street, N.W.
Washington, D.C. 20005

Jorge Marrero-Narvaez
Office of Legal Counsel
Puerto Rico Aqueduct and Sewer Authority
604 Barbosa Avenue
Hato Rey, Puerto Rico 00917

Janice Whitney, Esq.
Assistant Regional Counsel
U.S. EPA, Region II
26 Federal Plaza, Rm 1203
New York, N.Y. 10278

Dated:

_____
Mildred Connelly
Secretary

BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In the Matter of:	)	
Mayaguez Regional Sewage Treatment Plant Puerto Rico Aqueduct and Sewer Authority	)	NPDES Appeal No. 92-23
Docket Nos. PR0023795	)	

CERTIFICATION SHEET

The Environmental Appeals Board hereby certifies that the attached *Order Denying Review* in the above-referenced matter accurately reflects the opinion of the Board.

_____ _____
Nancy B. Firestone Date
Environmental Appeals Judge

_____ _____
Ronald L. McCallum Date
Environmental Appeals Judge

_____ _____
Edward E. Reich Date
Environmental Appeals Judge